Supreme Court, U.S.
FILED
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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*,

v.

JOE ELTON NIXON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

DID THE FLORIDA SUPREME COURT ACT CONTRARY TO THIS COURT'S DECISIONS IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984) AND *ROE V. FLORES-ORTEGA*, 120 S.CT. 1029 (2000), IN FINDING A DEFENSE COUNSEL WHO CONCEDED GUILT BUT VIGOROUSLY CONTESTED SENTENCE INEFFECTIVE *PER SE* UNDER *UNITED STATES V. CRONIC*, 466 U.S. 648 (1984), WHERE THE COURT ALSO FOUND THE EVIDENCE OF GUILT OVERWHELMING AND COUNSEL'S STRATEGY TO HAVE BEEN IN THE DEFENDANT'S BEST INTEREST AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE?

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida, *Petitioner*,

v.

Joe Elton Nixon, *Respondent*.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Nixon v. State, 758 So.2d 618 (Fla. 2000).

Petitioner's Appendix contains the opinion of the Florida Supreme Court in Nixon v. State, supra (A2 - A36), and the court's order denying rehearing (A1). Petitioner's Appendix also includes the previous opinion of the Florida Supreme Court affirming Nixon's conviction and death sentence, reported at Nixon v. State, 572 So.2d 1336 (Fla. 1990) (A37 - A57). Petitioner will refer to itself as "Petitioner" or "the State," and to Respondent as "Respondent" or "Nixon."[1]

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[1] The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The decision below was entered on January 27, 2000. On June 9, 2000, the Florida Supreme Court denied the State's Motion for Rehearing and/or Clarification. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Sixth Amendment is applicable to the States through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall . . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nixon was convicted of first-degree murder, kidnapping, robbery and arson, and sentenced to death for the first-degree murder conviction. On appeal, Nixon claimed he was denied effective assistance of counsel when his trial counsel conceded Nixon's guilt and sought leniency at the penalty phase. The Florida Supreme Court remanded to the trial court for hearing on this issue. Trial counsel testified for the defense that he had discussed with Nixon on more than one occasion that, should the state reject his plea offer, counsel's goal would be to save Nixon's life rather than to obtain an acquittal, and he would probably concede his guilt. Counsel testified that his relationship with Nixon preceded his arrest in this case, and Nixon never told him "not to do that." Supplemental record on appeal from the conviction at 47-54. The trial court found:

> 1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> 2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.
>
> 3. Nixon made no objection and did not protest the strategy and tactic employed at trial.
>
> Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial

Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

Nixon v. State, 572 So.2d 1336, 1340 fn. 3 (Fla. 1990) (A43). Because Nixon had invoked his attorney-client privilege to restrict the State's cross-examination of trial counsel, the Florida Supreme Court ultimately declined to "dispose of this claim" on direct appeal on the "present state of the record," and affirmed the convictions and sentences, including the death sentence, "without prejudice" to Nixon raising the issue by way of a Rule 3.850 motion for postconviction relief. Nixon v. State, supra (A43).

Subsequently, Nixon filed a state rule 3.850 motion for postconviction relief alleging, inter alia, ineffective assistance of counsel in conceding guilt. The state trial court summarily denied Nixon's motion for postconviction relief. That court first rejected Nixon's claim that "trial counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648 (1984)," without any demonstration of prejudice. The trial court found that "defense counsel's concession of guilt" was an "acceptable defense strategy" in the circumstances of this case. The trial court also rejected Nixon's alternative argument that his trial counsel was ineffective at the guilt phase under the two-part test of Strickland v. Washington, 466 U.S. 668 (1984), because the evidence of guilt was so overwhelming that Nixon could not show prejudice.

The Florida Supreme Court, by a vote of 4-2, reversed. The court held that if Nixon did not explicitly agree to his counsel's strategy, but merely acquiesced silently, trial counsel was ineffective *per se* under United States v. Cronic, 466 U.S. 648 (1984). The court remanded for an evidentiary hearing to determine whether there was an "affirmative, explicit acceptance by Nixon of counsel's strategy;" if not, Nixon was entitled to a new trial Nixon v. State, 758 So.2d 618, 624 (Fla. 2000) (A14).

The facts of Nixon's crime are set forth in the original opinion of the Florida Supreme Court affirming Nixon's conviction and death sentence:

> At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testifed that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.
>
> After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asker her to take him to his uncle's house because he was having car trouble. Once on

> the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G. According to the medical examiner, Ms. Bickner was alive at the time she was set on fire and the fire was the cause of death.

572 So.2d at 1338 (A38-39).

It is undisputed that Nixon was "very disruptive and uncooperative at trial," as noted in the majority opinion below. 758 So.2d at 625 (A14). Justice Wells described Nixons' behavior in his dissenting opinion:

> 2. Nixon was extremely uncooperative during the trial. He refused to be in court on several occasions. He took off his clothes in his holding cell to thwart the proceedings. The trial judge went to the holding cell to try to get Nixon to attend and cooperate, but Nixon continued to be uncooperative.

758 So.2d at 630 (Wells, J., dissenting) (A27). Despite Nixon's uncooperativeness, Nixon's trial counsel, Justice Wells noted, was "actively engaged" in the trial:

> 3. Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objecting to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985.

758 So.2d at 630-31 (Wells, J., dissenting) (A27).

A majority of the Florida Supreme Court, however, found that the only relevant aspects of trial counsel's performance were his remarks during his opening statement and closing arguments at the guilt phase of the trial. In his opening statement, trial counsel told the jury:

> In this case, there will be no question that Jeannie (sic) Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie (sic) Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur withing the next few years by electrocution or

> maybe its natural expiration after a lifetime of confinement.

758 So.2d at 620 (A4-5) (citing to Nixon, 572 So.2d at 1339). In his closing argument, trial counsel told the jury:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery and arson.

758 So.2d at 620 (A5) (citing Nixon, 572 So.2d at 1339).

In the view of both the majority and dissenting opinions, the legal issue before the court was, as stated by Justice Wells in dissent:

> whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of

> Strickland [v. Washington, 466 U.S. 668 (1984)] or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se.

758 So.2d at 631 (Wells, J., dissenting) (A28). The majority concluded that, unless Nixon explicitly consented to trial counsel's concession of guilt, Cronic applied. The court explained:

> We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984) .
>
> To determine which test applies, we must first decide whether Nixon's trial counsel "entirely fail(ed) to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659, 104 S.Ct. 2039.

758 So.2d at 622 (A9). In the view of the majority, trial counsel's concession of guilt was tantamount to an abandonment of the defense of his client. Id. at 622-23 (A9-11). And this was so notwithstanding the court's recognition "that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase." Id. at 623 (A11). In the view of the majority of the Florida Supreme Court, the "dividing line" between sound defense strategy and ineffectiveness of counsel was whether or not the defendant had consented to such strategy. If he did not, trial counsel's

performance was deficient, and this deficient performance was prejudicial per se. Ibid (A11-12).

The court analogized the concession of guilt to a guilty plea. In the context of a guilty plea, the court noted, a knowing, intelligent, and voluntary waiver of the right to a jury trial must be shown. 758 So.2d at 624 (A13-14) (citing Boykin v. Alabama, 395 U.S. 238) (1969). The court reasoned that counsel's comments in this case were the functional equivalent of a guilty plea" and that Nixon's claim of ineffective assistance of counsel "must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." The court emphasized: "*Silent acquiescence is not enough.*" 758 So.2d at 624 (A14) (emphasis supplied).

In elaboration, the court stated:

> We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed, counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. [Cit.] Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.

> It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision.

758 So.2d at 625 (A14-15).

In concurrence, Chief Justice Harding, joined by two other members of the majority, explicitly recognized that trial counsel was competent and that his strategy in this case was an effective one, reasonably calculated to help Nixon avoid the death penalty:

> I do not question the competence of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question *that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty.*

758 So.2d at 626 (A18) (Harding, C.J. concurring, joined by Anstead and Pariente, JJ.) (emphasis supplied). Dissenting Justice Wells also explicitly agreed that trial counsel's strategy was reasonable. 758 So.2d at 634 (A34). Justice Wells disagreed with the majority's application of Cronic to this case, noting that the majority's "expansive" interpretation of Cronic had been rejected by a number of federal circuit courts of appeal. Justice Wells analyzed this case as follows:

What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

The legal issue before us is whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland, or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se. . . .

. . . [T]he majority's decision is based on an overly expansive interpretation of Cronic. The majority's decision as to the application of Cronic is based on cases which either do not apply or cases whose reasoning have been justifiably criticized. The majority relies on cases from the Ninth and Tenth Circuits. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991), Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). The First Circuit has rightfully rejected the expansive interpretation placed on Cronic in Swanson and Osborn. In Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994), the First Circuit considered a case in which a lawyer argued

a defense on behalf of his client which was tantamount to admitting guilt:

> As mentioned above, the district court relied primarily on dictum contained in United States v. Cronic, 466 U.S. at 658-60, 104 S.Ct. At 2046-47, for the proposition that, in the circumstances at bar, it could forgo an inquiry into actual prejudice. The Cronic Court stated that in rare instances prejudice might be presumed "without inquiry into counsel's actual performance at trial." Id. at 662, 104 S.Ct. At 2048 (dictum). But, the approach suggested in this statement is in all events the exception, not the rule - and it can be employed only if the record reveals presumptively prejudicial circumstances such as an outright denial of counsel, a denial of the right to effective cross-examination, or a complete failure to subject the prosecution's case to adversarial testing. See, id. at 659, 104 S.Ct. At 2047. The Cronic Court itself warned that, in most cases, a showing of actual prejudice remained a necessary element. See id. The Court stated: "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of

counsel undermined the reliability of the finding of guilt." Id. at 659 n. 26, 104 S.Ct. At 2047 n. 26.

For the most part, courts have been cautious in invoking the exception limned in the Cronic dictum. . . .

A few courts have extended the exception's boundaries beyond the circumstances and found that a lawyer's particular errors at trial may cause a breakdown in the adversarial system and thus justify invocation of the Cronic dictum. See Swanson, 943 F.2d at 1074 (holding that knowingly and explicitly conceding reasonable doubt in closing argument is *per se* prejudicial); Osborn, 861 F.2d at 628-29 (finding *per se* prejudice when defense counsel intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had no evidence to support his claims). *We believe that these cases misperceive the rationale underlying the Cronic exception. In our view, the Court's language in Cronic was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance -*

for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter - that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. See Cronic, 466 U.S. at 658-59, 104 S.Ct. At 2046-47. But attorney errors particular to the facts of an individual case are qualitatively different. Virtually by definition, such errors "cannot be classified according to likelihood or causing prejudice" or "defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Consequently, the Court has declined to accord presumptively prejudicial status to them. See id.

We are not alone in our attempt to harmonize Cronic with Strickland by drawing an easily visible line separating those few cases in which prejudice may be presumed from the mine-run (in which actual prejudice must be shown). When confronted by particular errors on the part of defense counsel, best evaluated in

> the context of the defendant's trial, other federal courts have refused to march under the Cronic banner, and instead, notwithstanding the seriousness of the errors, have performed both parts of the requisite Strickland analysis. . . .

38 F.3d at 11-14 (footnotes omitted) (emphasis added).

The Fifth Circuit has also been critical of the Ninth Circuit with regard to that court's interpretation of Cronic. In Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997), the court held:

> While gleaning insight from Swanson's statement of Sixth Amendment principles, we do not necessarily endorse its finding of a constructive denial of counsel. *Defense counsel in Swanson failed to call witnesses and conceded in his closing argument that the evidence of his client's guilt was overwhelming. These appear to be trial errors amenable to Strickland analysis.* See Scarpa v. Dubois, 38 F.3d 1, 12 (1st Cir. 1994) (criticizing Swanson), cert. denied, 513 U.S. 1129, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995).

103 F.3d at 1229 n. 12 (emphasis added). In Vines v. United States, 28 F.3d 1123 (11th Cir. 1994), the Eleventh Circuit stated:

> Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984).

Id. at 1128 n. 8.

No fair reading of the instant record can lead to the conclusion that Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase. . . .

758 So.2d at 631-34 (Wells J., dissenting) (A27-34).

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S CONCLUSION THAT TRIAL COUNSEL WAS INEFFECTIVE PER SE IN PURSUING AN EFFECTIVE STRATEGY, ACQUIESCED TO BY THE DEFENDANT AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE, IS CONTRARY TO THIS COURT'S DECISIONS IN *STRICKLAND V. WASHINGTON* AND *ROE V. FLORES-ORTEGA*

Analysis of this case begins with the proposition, agreed to by the court below, that, in a death penalty case, it may be sound strategy for defense counsel to acknowledge the sufficiency of the state's proof at the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Nixon v. State, supra, 758 So.2d at 623 (A11). As noted in Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299 (1983) (cited in Strickland v. Washington, supra, 466 U.S. at 662, fn. 32):

> In a death penalty case, . . . the possible punishment is so extraordinary that the defense attorney must consider from the outset the impact that the guilt phase defense may have on sentencing. Since the capital case defense attorney may have to be an advocate both for acquittal and for life, she should not frame a defense case for acquittal which will preclude or handicap effective advocacy for life. Indeed, in case where a severe conflict or inconsistency between advocacy for acquittal and advocacy for life exists, the defense attorney will be forced to make the difficult decision of preferring one over the other. *The relationship between this advocacy choice and the assessment of an attorney's competence in such*

> *cases cannot be overlooked in formulating standards of effective assistance in capital cases.*
>
> In many capital cases, the evidence of guilt is overwhelming. Such cases go to trial either because the prosecutor will not bargain for a sentence less than death or because the defendant will not accept a sentence of life imprisonment without the possibility of parole. In these cases, although the defendant will almost certainly be convicted, the defendant has nothing to lose by proceeding with a trial on the capital charges. However, *if the guilt phase is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase.*

Id. at 329 (emphasis supplied). In this case, it has never been contested that trial counsel made a strategic decision, and a majority of the court below concluded not only that counsel made a strategic decision, but that counsel's strategic decision was effective and reasonably calculated to help Nixon avoid a death sentence.[2] Nevertheless, the Florida Supreme Court found that, absent explicit consent by Nixon to counsel's strategy, counsel was ineffective per se. The court reached this conclusion without finding *either* deficient attorney performance *or* prejudice. Instead, the court concluded that conceding guilt without the client's explicit consent is ineffective per se under Cronic no matter how uncooperative Nixon was, no matter how effective counsel's strategy may have been and no matter what Nixon's best interests may have been.

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[2] Three justices in the majority and one dissenter *explicitly* drew this conclusion; thus, a majority of the court explicitly found that trial counsel's strategy was reasonable and effective considering the circumstances of this death penalty trial.

The Florida Supreme Court reached its conclusion in reliance upon this Court's decision in Boykin v. Alabama, 395 U.S. 238 (1969) in which this Court held that a guilty plea may only be entered after the defendant himself has knowingly, intelligently and voluntarily waived his right to a trial. The Florida Supreme Court concluded that trial counsel's concession was the "functional equivalent of a guilty plea" and that the same waiver standard should therefore apply. However, as noted in Boykin itself, "a plea of guilty is more than an admission of conduct; it is a conviction." In this case, trial counsel's concession was not in itself a conviction; regardless of his concession, the burden remained on the state to prove to the satisfaction of the jury beyond a reasonable doubt that Nixon was guilty, pursuant to the law as given to the jury in charge. Furthermore, certain issues were preserved for appeal notwithstanding counsel's concession that would not have been preserved if Nixon had pled guilty, including appellate review for sufficiency of the evidence and appellate review of objections that trial counsel preserved for appeal, such as objections to the introduction of allegedly inflammatory photographs and to portions of the prosecutor's closing argument. Thus, trial counsel's concession was not "a conviction," and Boykin does not support the decision of the Florida Supreme Court to find ineffectiveness *per se* absent any demonstration of either deficient attorney performance or prejudice.

It is Petitioner's contention that trial counsel's strategic decision in this case is properly reviewed under the two part test of Strickland v. Washington, supra, rather than under dicta in Cronic suggesting that, when trial counsel's performance is so lacking that it amounts to no meaningful assistance at all, a breakdown in the adversarial process has occurred which will be deemed prejudicial per se. The Florida Supreme Court failed to recognize or give sufficient weight to the reality that, in a death penalty trial, the most important issue may not be guilt but

sentence.[3] In a capital case in which the evidence of guilt is overwhelming, a defendant whose attorney decides after reasonable investigation not to contest guilt in order to maximize defense credibility at the penalty phase and maximize the defendant's chances of being sentenced to life rather than death simply has not been "denied any meaningful assistance of counsel at all," and Cronic should not apply. Two of the federal cases on which the Florida Supreme Court relied, United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) and Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), were not capital prosecutions and the courts found that trial counsel had no sufficient reason to concede guilt.[4] Here, the Florida Supreme Court conceded that trial counsel's performance was not only strategic, but effective, but still applied Cronic.[5] At least where trial counsel's concession

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[3] See Goodpaster, supra at 338: "The major action in capital cases no longer necessarily takes place at the guilt trial. Penalty trials are not ordinary sentencing hearings; they are complete trials on a crucial issue - life - and counsel and courts must so view them."

[4] The Swanson court noted that the government had failed to identify any strategy that could have justified trial counsel's concession of guilt. In Wiley, the state did argue that counsel's goal was to obtain leniency in sentencing; however, the circuit court did not find this to have been reasonable strategy absent any evidence that counsel's guilt-phase strategy contributed to his sentencing strategy. It should be noted that Wiley pre-dated Strickland and Cronic and that it was still an open question at the time whether a defendant had any burden to prove prejudice on any kind of ineffectiveness claim; further, the court found that in light of the weakness of the state's case of guilt, counsel's concession of guilt *was* prejudicial.

[5] A third federal case relied on by the Florida Supreme Court, Osborne v. Shillinger, 861 F.2d 612 (10th Cir. 1988), was a death penalty case, but in that case the defendant had pled guilty; the court found that counsel had abandoned his duty of loyalty to his client, had failed to investigate, had no strategic reason for opposing his clients' attempt to withdraw his guilty plea or for the comments he made at the penalty phase which essentially conceded the propriety of a death sentence for his client. In fact, the court did analyze the case under Strickland, although the court

is strategic, counsel's concession of guilt should be analyzed under the two part test of Strickland, to determine whether trial counsel's performance was (a) deficient and (b) prejudicial.[6]

As noted in Justice Wells' dissenting opinion, the federal circuit courts of appeal are divided in their interpretation of Cronic where trial counsel has conceded or failed vigorously to contest guilt. Both the Fifth and First Circuit Courts of Appeal have criticized decisions of the Ninth and Tenth Circuits, concluding that these cases have mis-perceived the rationale underlying Cronic and that the concession of guilt in closing argument appears to be a trial-type error amenable to a Strickland analysis. Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994); Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997). Other federal courts have simply applied a Strickland analysis to such claims. See, e.g., Lobosco v. Thomas, 928 F.2d 1054, 1056-58 (11th Cir. 1991) (claim of ineffectiveness of counsel in regard to counsel's concession of guilt in closing argument analyzed and rejected under Strickland); United States v. Sanchez, 790 F.2d 245, 253-54 (2nd Cir. 1986) (claim of ineffective assistance of counsel analyzed and rejected under Strickland, where defense counsel largely adopted strategy of silence and where defendant absented himself from proceedings and failed to consult with attorney).

Petitioner would note, additionally, that state courts have reached conflicting results on this issue. *Compare* State v. Harbison, 337 S.E. 2d 504 (N.C. 1985) ("when counsel admits his client's guilt without first obtaining the client's consent, the client's right to a fair trial and to put the State to the burden of proof are completely swept away") *with* Thompson v. State, 915

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also concluded in addition that counsel had so abandoned his duty to his client that Cronic probably applied.

[6] Defense counsel often concede that the defendant is guilty of some crime, even if they dispute that the defendant is guilty of the most serious crime charged.

S.W.2d 897, 902-05 (Tex. App. 1996) (defense counsel's admission of defendant's guilt at voir dire and closing argument at guilt phase analyzed and rejected under Strickland), and People v. Johnson, 538 N.E.2d 1118, 1124-25 (Ill 1989) (court rejected argument that is it per se ineffectiveness whenever defense attorney concedes guilt to offenses in which there is overwhelming evidence of guilt but fails to show on the record consent by defendant).

Resolution of this conflict is a valid basis by itself for this Court to grant certiorari in this case.

Additionally disturbing about the opinion of the Florida Supreme Court is its conclusion that, unless trial counsel is able to obtain a disruptive and uncooperative defendant's explicit consent to concede guilt in the face of overwhelming evidence and to focus on saving his client's life, trial counsel must contest guilt even when so doing not only would be useless at the guilt phase, but would work to his client's "detriment" at the penalty phase. This conclusion, Petitioner would submit, is contrary this Court's admonition in Strickland that counsel "owes the client a duty of loyalty." 466 U.S. at 688. Thus, federal courts have held that, when faced with an uncooperative client, an attorney must represent his client in the best way possible under the circumstances. See, e.g. Harding v. Davis, 878 F.2d 1341, 1344 (11th Cir. 1989) ("even a criminal defendant's complete non-cooperation does not free his lawyer to abdicate his professional responsibility to represent his client in the best way possible under the circumstances"). As this Court emphasized in Strickland, the "benchmark" for judging a claim of ineffectiveness is whether or not the trial can "be relied on as having produced a just result." 466 U.S. at 686. Ensuring such a just result cannot be accomplished by requiring counsel to adopt a strategy harmful to his client simply because he has an uncooperative client who refuses to choose a strategy. Moreover, such requirement "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 689. The Florida Supreme Court erred

in requiring counsel to adhere to mechanical rules regardless of the best interests of his client.

The state trial court found that trial counsel had talked to Nixon about the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon. The trial court also found that Nixon did not object to or protest trial counsel's strategy. The Florida Supreme Court did not reject these findings, but simply found them insufficient, holding that trial counsel was ineffective per se if counsel did not obtain Nixon's "affirmative, explicit" consent to counsel's strategy. In the view of the Florida Supreme Court, Nixon's "silent acquiescence" was not enough to bring counsel's performance outside the ambit of Cronic. It is Petitioner's contention that the decision of the Florida Supreme Court is inconsistent with, and contrary to, this Court's recent decision in Roe v. Flores-Ortega, ___ U.S. ___, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

In Roe v. Flores-Ortega, this Court reviewed a decision of the Ninth Circuit Court of Appeals holding that, in order to establish ineffective assistance of counsel in failing to file a notice of appeal, a habeas petitioner "need only show that his counsel's failure to file a notice of appeal *was without the petitioner's consent.*" Id., 120 S.Ct. at 1034 (emphasis supplied). This Court rejected this "bright line" rule in favor of a more case-specific analysis as required by Strickland v. Washington.

In its analysis of this issue, this Court first noted that it had long held that a lawyer who "disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Ibid. At the "other end of the spectrum" was a defendant who explicitly instructs his attorney not to file an appeal. Such a defendant, this Court held, may not later complain that, by following his instructions, his attorney performed ineffectively. Ibid. Between "those poles" was the case in which the defendant had not clearly conveyed his wishes one way or the

other. In this last kind of case, the Courts of Appeals for the First and Ninth Circuits applied a "bright line" rule, holding that counsel is per se deficient if he fails to file a notice of appeal unless the defendant specifically instructs otherwise. This Court concluded that this bright-line rule was "inconsistent with Strickland's holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" Ibid. As the lower court in Roe had "failed to engage in the circumstance-specific reasonableness inquiry required by Strickland," this Court reversed. Ibid.

This Court concluded that if counsel consults with his client about an appeal, he performs in a professionally unreasonable manner only if he fails to follow the defendant's express instructions with respect to an appeal. Even if counsel does not consult with his client, his performance cannot be considered deficient per se, but must be evaluated under all the circumstances. Any other course would be inconsistent with Strickland's rejection of "mechanistic rules governing what counsel must do." Roe v. Flores-Ortega, 120 S.Ct. at 1036.

In the instant case, the Florida Supreme Court held that consultation and acquiescence was not enough. Instead, the Florida Supreme Court applied a per se rule that, absent Nixon's explicit consent to counsel's guilt-phase strategy, counsel was constitutionally ineffective. This is the imposition of exactly the kind of "mechanical rules on counsel" which this Court rejected in Strickland. Roe v. Flores-Ortega, 120 S.Ct. at 1037.

The Florida Supreme Court should have analyzed the performance of Nixon's trial counsel under all the circumstances, instead of finding ineffectiveness per se despite concluding that trial counsel's strategy was reasonable and effective in the circumstances of this case. The Florida Supreme Court failed to engage in the circumstance-specific reasonableness inquiry required by Strickland before concluding that counsel's

performance was deficient, and "that alone mandates vacatur and remand." 120 S.Ct. 1035.

The Florida Supreme Court also erred in finding prejudice per se where counsel failed to obtain his client's explicit consent to his strategy. This was not a case in which the defendant, either actually or constructively, was denied the assistance of counsel altogether. While a trial counsel's concession of guilt in a death-penalty case may lead "to a judicial proceeding of disputed reliability," there is no "forfeiture of the proceeding itself." 120 S.Ct. at 1038. A trial occurred in this case. Counsel's performance in this case, even if deficient, at most deprived Nixon of a "fair" trial, not of a trial altogether. Ibid. Therefore, Nixon should be required to show actual prejudice in order to obtain relief, and the Florida Supreme Court erred in holding otherwise.

CONCLUSION

The Florida Supreme Court failed to analyze counsel's performance under Strickland and require Nixon to establish (1) deficient attorney performance considering all the circumstances, and (2) actual prejudice. Instead, the Florida Supreme Court undertook neither part of the Strickland inquiry, but analyzed this case under Cronic. Cronic, however, is meant to apply only to those rare cases in which the defendant was denied any meaningful assistance at all. This is not such a case. The Florida Supreme Court failed to give any deference to trial counsel's "strategic choices" or to his evaluation of the risks of contesting guilt when the evidence of guilt was overwhelming and the issue of sentence would be litigated before the same jury who would have heard the evidence and decided the issue of guilt. Nor did the court properly consider other facts and circumstances of the case, including the difficulty of obtaining explicit consent from such an uncooperative client.

Furthermore, the Florida Supreme Court has issued a decision which not only imposes mechanical rules on counsel, but

requires adherence to those mechanical rules even if so doing would be detrimental to his client's best interests.

The issue here is not whether counsel ordinarily should consult with his client, contest guilt, or obtain his client's consent before conceding guilt. Defense counsel ordinarily would and should do all these things. The question is whether, in a capital trial in which death is a possible sentence and the evidence of guilt is overwhelming, trial counsel is ineffective *per se* if he concedes guilt after discussing such strategy with the defendant but without obtaining the explicit consent of his client, even if it is shown that such concession was reasonable and effective strategy designed to maximize the defendant's chances of avoiding a death sentence. The Florida Supreme Court answered that question incorrectly by misapplying Cronic rather than Strickland. Certiorari review is warranted, and summary reversal sought, of the decision of the Florida Supreme Court.

Respectfully submitted,

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida, *Petitioner*,

v.

Joe Elton Nixon, *Respondent*.

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Supreme Court of Florida

FRIDAY, JUNE 9, 2000

CASE NO.: SC92006; SC93192
Lower Tribunal No.: 84-2324

JOE ELTON NIXON vs. STATE OF FLORIDA
JOE ELTON NIXON vs. HARRY K. SINGLETARY, ETC.

Appellant/Petitioner Appellee/Respondent

Appellee/Respondent's Motion for Rehearing and/or Clarification filed in Case No. SC92006 is hereby denied.

HARDING, C.J., and SHAW, ANSTEAD and PARIENTE, JJ., concur.
WELLS and LEWIS, JJ., dissent.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

tc
Served:

ANTHONY S. GUARISCO, JR.
JONATHAN LANG
CAROLYN M. SNURKOWSKI
HON. DAVE LANG, CLERK
HON. L. RALPH SMITH, JUDGE

Joe Elton NIXON, Petitioner,

v.

Harry K. SINGLETARY, Respondent,

Joe Elton NIXON, Appellant,

v.

State of Florida, Appellee,

Nos. SC93192, SC92006

Supreme Court of Florida.

Jan. 27, 2000

Rehearing Denied June 9, 2000

After his first-degree murder, kidnapping, robbery, and arson convictions and death sentence were affirmed on direct appeal, 572 So.2d 1336, defendant sought postconviction relief. The Circuit Court, Leon County, L. Ralph Smith, Jr., J., denied motion. Defendant appealed and petitioned for writ of habeas corpus. The Supreme Court held that: (1) remand was required to permit trial court to determine whether defendant consented to trial strategy in which counsel conceded guilt, and (2) presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of defendant's affirmative, explicit acceptance of that strategy.

Remanded.

Harding, C.J., concurred and filed a separate opinion in which Anstead and Pariente, JJ., concurred.

Anstead, J., concurred specially and filed a separate opinion.

Wells, J., dissented and filed a separate opinion.

Lewis, J., dissented.

Jonathan Lang, New York, New York, for Petitioner/Appellant.

Robert A. Butterworth, Attorney General, and Richard B. Martell, Chief, Capital Appeals, Tallahassee, Florida, for Respondent/Appellee.

PER CURIAM.

Joe Elton Nixon, a prisoner under sentence of death, appeals the trial court's order denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Nixon also petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we remand this case to the circuit court to hold an evidentiary hearing on Nixon's ineffective assistance of counsel claim.

Nixon was convicted of first-degree murder, kidnapping, robbery, and arson. He was sentenced to death for the first-degree murder conviction. On appeal, this Court affirmed the conviction and sentences, including the death sentence. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).

Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appeals the trial court's denial of his motion for postconviction relief. He also petitions this Court for a writ of habeas corpus. Nixon raises

seven issues relating to the trial court's denial of his rule 3.850 motion.[1] He raises three issues in his petition for writ of habeas corpus.[2] We find the resolution of one issue to be dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial.

Nixon's trial counsel made the following remarks during his opening statement in the guilt phase:

> In this case, there was be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise,

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[1] Nixon argues the following claims relating to the trial court's denial of his 3.850 motion: (1) the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) he was denied his rights not to be tried while mentally incompetent; (3) his death sentence must be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) he is entitled to prove his claims under Johnson v. Mississippi, 486 U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

[2] Nixon presents the following claims in his habeas petition: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competence to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State, and Jackson v. State.

> that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 572 So.2d at 1339. During his closing argument, Nixon's counsel said:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id. Nixon argues that these comments were the equivalent of a guilty plea by his attorney. He claims that he did not give his attorney consent to enter a guilty plea or agree to allow his attorney to undertake a trial strategy in which guilt would be

admitted.[3] Nixon claims that as a result of these comments, he was denied effective representation.

On direct appeal, this Court addressed this issue and remanded the case to the trial court for an evidentiary hearing to determine whether counsel had received Nixon's consent to use this trial strategy:

> Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

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[3] Nixon voluntarily absented himself from the courtroom during his trial. Hence, he was not present when his attorney made the statements in question.

Id. at 1339-40. This Court eventually declined to rule on the matter:

> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Id. at 1340 (footnote omitted).

We begin our analysis by reiterating that the Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend VI.[4] The United States Supreme Court has stated that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for its affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

In addition to the right to effective assistance of counsel, "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364

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[4] "In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court held that the Sixth Amendment right to counsel was incorporated into the due process clause [of the Fourteenth Amendment] and would apply to the states in all felony prosecutions." Vagner v. Wainwright, 398 So.2d 448, 450 (Fla. 1981).

(1970). The State bears the burden of making this demonstration. See Speiser v. Randall, 357 U.S. 513, 526 (1958).

The parties are in disagreement regarding the appropriate standard of review in this case. The State urges this Court to apply Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. Nixon, on the other hand, argues that counsel's conduct in this case amounted to per se ineffective assistance of counsel, and that United States v. Cronic is the proper test. In Cronic, decided the same day as Strickland, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see Michel v. Louisiana, 350 U.S. 91, 100-101 1955), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the

> adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner has been "denied the right to effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966).

Cronic, 466 U.S. at 658-59 (emphasis added).

We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984).

To determine which test applies, we must first decide whether Nixon's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. Trial counsel's statements during opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the State's case to meaningful adversarial testing. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) ("Mr. Ochoa's statements lessened the Government's burden of persuading the jury that Swanson was the perpetrator of the bank robbery[,] . . . tainted the integrity of the trial[,] . . . [and] was an abandonment of the defense of his client at a critical stage of the criminal proceedings.");[5] Osborn v.

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[5] The Swanson court also stated:

> The circumstances presented in this matter demonstrates the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. Once Swanson's court appointed attorney told the

jury that there was no reasonable doubt regarding his client's identity as the perpetrator of the crime charged against him, he ceased to function as defense counsel. "An effective attorney 'must play the role of an active advocate, rather than a mere friend of the court.'" Osborn, 861 F.2d at 624 (quoting Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985)). Instead of serving as his client's advocate during closing argument, Mr. Ochoa abandoned his client at a critical stage of the proceedings and affirmatively aided the prosecutor in her efforts to persuade the jury that there was no reasonable doubt that Swanson was the person who intimidated the victims and robbed the bank.

Mr. Ochoa's abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest. In Osborn, the Tenth Circuit commented as follows:

> A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

861 F.2d at 629.

The Government has failed to identify any strategy that can justify Mr. Ochoa's betrayal of his client. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, 466 U.S. at 656-57 n. 19, 104 S.Ct. at 2045-46 n. 19. By arguing that no reasonable doubt existed regarding the only factual issues in dispute, Mr. Ochoa shouldered part of the Government's burden of persuasion.

We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.

Shillinger, 861 F.2d 612, 625 (10th Cir. 1988) ("[A]n attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'"). Therefore, if Nixon can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective per se and Cronic would control. We agree with the reasoning of Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981), where the Sixth Circuit Court of Appeals stated:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Under Cronic, a defendant need not show prejudice; prejudice is presumed. See 446 U.S. at 658-60. See also State v. Harbison, 337 S.E.2d 504, 507 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed."). On the other hand, if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim.

We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Of course, in such

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943 F.2d at 1075 (emphasis added).

cases, the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981); Jones v. State, 877 P.2d 1052 (Nev. 1994); State v. Anaya, 592 A.2d 1142 (N.H. 1991); State v. Harbison, 337 S.E.2d 504 (N.C. 1995).

Although an attorney has the right to make tactical decisions regarding trial strategy, see Faretta v. California, 422 U.S. 806, 820 (1975), the determination to plead guilty or not guilty is a matter left completely to the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . ."); Brookhart v. Janis, 384 U.S. 1 (1966) (stating that although an attorney can make tactical decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a "not guilty" plea. By pleading "not guilty," Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. See Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965); Licata v. State, 81 Fla. 649, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." Wiley, 647 F.2d at 650.

Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial. Because Nixon previously invoked the attorney-client privilege, the 1990 Court was unable to get the answer to this question. Essentially, the 1990 Court issued an invitation to Nixon to raise this issue again in his 3.850 motion.

Implicit within that invitation was that the postconviction circuit court conduct another evidentiary hearing, without the risk of the attorney-client privilege, to determine whether Nixon consented to the strategy. Despite this, the circuit court in the present postconviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years. Therefore, we remand this case for an evidentiary hearing on this issue. Due process demands this result.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that a defendant may not enter a guilty plea unless that plea is intelligent and voluntary:

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See Kercheval v. United States, 274 U.S. 220, 223. Admissibility of a confession must voluntariness issue which satisfies the constitutional rights of the defendant." Jackson v. Denno, 378 U.S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, than an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of

> guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422.

Id. at 242-43 (footnote omitted). Consequently, this Court has stated that "[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." Koenig v. State, 597 So.2d 256, 258 (Fla. 1992). See also Fla. R. Crim. P. 3.172.

Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough. We also make clear that pursuant to Nixon's ineffective assistance of counsel claim, Nixon has waived the attorney-client privilege. See Reed v. State, 640 So.2d 1094, 1097 (Fla. 1994) ("Thus, it is clear that conversations between the defendant and his or her trial lawyer relevant to ineffective assistance of counsel are not protected by the attorney-client privilege."); Sec. 90.502(4)(c), Fla. Stat. (1999).

We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed, counsel's strategy may have been in Nixon's best interest. Nevertheless, the

Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. See Jones; Brookhart. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.

It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision. Cf.. Faretta, 422 U.S. at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

Finally, in order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. See Wiley, 647 F.2d at 650 ("In those areas where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin."); State v. House, 456 S.E.2d 292, 297 (N.C. 1995) ("Further, we take this opportunity to urge both the bar and the trial bench to be diligent in making a full record of a defendant's

consent when a Harbison issue arises at trial."). This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Accordingly, for the reasons stated in this opinion, we remand this case to the circuit court to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt. In light of our disposition of Nixon's 3.850 appeal, we do not address his habeas claims at this time.

It is so ordered.

HARDING, C.J., and SHAW, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., concurs with an opinion, in which ANSTEAD and PARIENTE, JJ., concur

ANSTEAD, J., specially concurs with an opinion.

WELLS, J., dissents with an opinion.

LEWIS, J., dissents.

HARDING, C.J., concurring.

"We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. Const. preamble (emphasis added). As exemplified by the Preamble to this nation's Constitution, justice is the very foundation upon which our system of government was built. Inherent within the concept of justice is the fair processing of cases. Black's Law Dictionary provides the following definition of justice:

> Proper administration of laws. In jurisprudence, the constant and perpetual disposition of legal matters or disputes to render [all persons their] due.

Black's Law Dictionary 864 (6th ed. 1990) (emphasis added). Consequently, the term "due process of law" has developed to mean:

> A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights.

Id. at 500.

Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocent until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. See In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to

be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreword to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla. R. Crim. P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its

case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Aside from the merits, this case is troublesome because of the length of time it has taken for this Court to get to this point. The trial in this case occurred in 1985, yet the trial court's ruling on the 3.850 petition was not ripe for our review until the end of 1998. However troubling this may be, the amount of time this case has taken should in no way bear upon our ultimate decision on the merits. No defendant should be denied the relief required simply because of delay.

For these reasons, I concur with the majority opinion.

ANSTEAD and PARIENTE, JJ., concur.

ANSTEAD, J., specially concurring.

I concur in Chief Justice Harding's opinion. The outcome of this case is controlled by the holding of the United States Supreme Court:

> [E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

Cronic, 466 U.S. at 656-57 n.19 (emphasis supplied). Obviously, a decision to "stand trial" was made here.

As to the issue concerning counsel's decision to, in essence, enter a plea of guilty without Nixon's consent, the dissent reminds us of the adage that "hard cases make bad law." When we decide cases, we must do so in accord with rules of law that

apply to all cases, and therein lies one of the principle flaws in the dissenting opinion. That opinion fails to acknowledge, much less discuss, the rule of law concerning the entry of a guilty plea, and counsel's role and responsibility to her client if counsel believes that a guilty plea should be entered. Instead, it simply concludes this was a hopeless case with horrible facts; therefore, counsel should be free to do anything, including pleading the defendant guilty without the consent of the defendant.[6] As to the law, while the dissent apparently concludes that this defendant's case is hopeless, it ignores the cases to come, especially the ones that will arise if we were to adopt a rule of law that says counsel can make the decision as to a plea of guilty without the consent of the client. That is part of the "bad law" that would come from this "hard case" if we accepted the dissenting view.

The dissent also ignores the fact that the postconviction proceedings and enlargement of the record we previously mandated have never occurred. On direct appeal, we refused to deal with the competency of counsel claim because of the inadequacy of the record and with the express provision that it would be more properly resolved in a postconviction proceeding. See Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990). We know this not only because we expressly said so in Nixon, but also because we had the same issue arise in a subsequent case where we cited our holding in Nixon as one requiring an evidentiary hearing in a postconviction action. See Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995). By approving the trial court's decision, we would be concluding that the same record that was

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[6] In fact, the procedure advocated by the dissent here would be much worse and more prejudicial than the entry of a formal plea of guilty, because at least a formal plea would have foreclosed the State from presenting, during a trial on guilt, the extensive devastating evidence of guilt alluded to by the dissent. The kind of "guilty plea" allowed here to be entered by counsel alone gave the defendant the worst of all worlds: an admission of guilt plus the devastating evidence put on by the State during a guilt phase trial that was rendered unnecessary by counsel's guilty plea.

declared inadequate by a unanimous court in 1990 has now become adequate to resolve this issue, and we would be overruling the holding of a unanimous court in the 1990 opinion. Further, we would be ignoring our prior explicit mandate in this very case, and ruling now, as a matter of law, that a lawyer is authorized to concede a defendant's guilt regardless of the defendant's views or input.

The record presented to us also reflects a serious issue as to Nixon's competency. Nixon's competency to stand trial first became an issue when he stood trial on an unrelated assault and battery charge five months before his murder trial.[7] At that trial, Nixon's attorney raised the issue of his client's competency. That prompted the judge to request a psychologist, Dr. Carolyn Stimel, to examine Nixon. This examination occurred during the lunch hour of the proceedings and last approximately forty-five minutes. The evaluation did not consist of any psychological testing nor was a formal competency evaluation made. Notwithstanding, the assault trial continued.

The next time that Nixon's competency was discussed was during a pretrial conference in the murder case. At this pretrial conference, the state attorney was concerned about Nixon's competency and urged an examination. There is also evidence that months before trial, Dr. Ekwall opined that Nixon's intelligence was "on the law side of normal, but its adequate." Finally, in 1993, Nixon was examined by three different mental health experts, all three of whom opined that Nixon suffers from mental retardation and may have some form of organic brain damage or organic personality disorder. Despite these concerns, however, both parties essentially concede that no competency hearing was ever conducted.

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[7] This assault trial involved the same counsel and was conducted before the same judge who presided over his murder trial.

Specifically, Dr. Henry Lee concluded that Nixon suffers from mental retardation and shows unmistakable evidence of Organic Personality Disorder. After evaluating Nixon, he found it surprising that no formal competency hearing was conducted in this case, especially given Nixon's bizarre conduct and statements prior to and during trial. He also found that in addition to the record information, the affidavits of several people, including an attorney skilled in defending the mentally ill, attest to Nixon's psychotic behavior. Dr. Denis William Keyes also concluded that Nixon is mentally retarded and suffers from evident brain damage. The psychological tests administered to Nixon place him below the lowest one percent of the population. Finally, Dr. Alec J. Whyte opined that Nixon suffers from mental retardation and an organic personality disorder. He specifically noted that the process of a criminal trial was beyond Nixon's competence to comprehend, and that his behavior during the trial is evidence of his inability to comprehend what was occurring.

All three of these opinions were based in part on Nixon's behavior before and during trial. This behavior included Nixon's refusal to leave his cell during pretrial hearings, the removal of his clothing, and his hiding under the sheets of his bed when summoned by officials. Furthermore, two months before trial, Nixon wrote an incoherent letter to his attorney that appeared to demonstrate a severe mental imbalance.

Based primarily on the above evidence and evaluations of the mental health experts, Nixon alleged in his 3.850 motion that he was not competent to stand trial. Notwithstanding, the trial court summarily denied this claim, finding it procedurally barred. However, the record does not support this conclusion. On the contrary, the record reflects that at the very least, Nixon was entitled to an evidentiary hearing on whether he was competent to stand trial. See Peede v. State, 24 Fla.L.Weekly S391, S393 (Fla. Aug. 19, 1999); Jones v. State, 478 So.2d 346 (Fla. 1985). In fact, the State concedes that because the judge, prosecutor, and defense counsel in this case, as well as some of the experts who

evaluated Nixon contemporaneously with the time of trial and who opined that a competency hearing was not necessary, are still available, a nunc pro tunc hearing could be held in this case. See Mason v. State, 489 So.2d 734 (Fla. 1986).

WELLS, J., dissenting.

I dissent.

A thorough review of the record and a plain reading of our opinion in Nixon's direct appeal leads me to the inescapable conclusion that Nixon's claim of ineffective assistance of counsel is governed by Strickland v. Washington, 466 U.S. 668 (1984). Competent, substantial evidence supports the trial court's summary denial of Nixon's claim.

I begin my analysis with reference to the facts as set forth in this Court's opinion in Nixon v. State, 572 So.2d 1336 (Fla. 1990):

> At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they

saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.

After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon his Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where th took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G.

572 So.2d 1338.

I next note the following statements from the two able and experienced trial judges who were involved in this case. First, is the statement of Judge hall made at the close of the proceedings in 1985:

> One facet of the case that doubtless will come under examination is the tactics, strategy, analysis employed by defense counsel in this case.
>
> Trial court is uniquely situated in our judicial system. It's the only judicial officer that sees the people that appear, and observes their demeanor, is able to see the impact that the case has upon the jury, observe that impact, and so forth, as the jury hears it. Privy to the evidence and privy to that evidence as it is presented in the courtroom.
>
> Doubtless, there may be those who have reservations about the approach employed by trial counsel for the defense in this case.
>
> It is my view that the tactic employed by trial counsel in this case was an excellent analysis of reality of his case and the preservation of his credibility and the credibility of any mitigating circumstances that could have been placed before the jury and before this Court, as to disposition.
>
> It is my view, in view of the evidence in this case, the jury has found the defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. I think that the evidence, preparation of the case, presentation,

would have persuaded any jury, not only beyond a reasonable doubt, but beyond all doubt.

For trial counsel to have inferred that Mr. Nixon was not guilty of these offenses would have deprived him of any credibility during the penalty phase, and to some extent, although professionalism would have detracted a little bit from it, under a sentencing hearing before the Court. I think the trial counsel's approach, the maintenance of credibility, his rapport with the jury, were the only realistic steps that could have been taken, in an effort to give some relief to his client.

A less experienced attorney, probably seeking to avoid criticism - either public, private or professional - would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.

Mr. Cronin's approach, his analysis, his assessment, I think was right on the mark. I think that his approach has been conscientious and in diligent best interest to defend his client, Mr. Nixon.

Second, I note the statement of Judge Smith in ruling upon Nixon's Cronic[8] claim in the postconviction proceedings.

Finally, in respect to the trial record and the direct appeal, there are three matters which are crucial to my conclusion that the majority's decision is wrong:

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[8] United States v. Cronic, 466 U.S. 648, 654 (1984).

1. Nixon was presumed to be mentally competent to stand trial. There was no determination by the trial court that he was incompetent, and no issue was raised on appeal that the trial court erred in failing to find him incompetent to proceed.

2. Nixon was extremely uncooperative during the trial. He refused to be in court on several occasions. He took off his clothes in his holding cell to thwart the proceedings. The trial judge went to the holding cell to try to get Nixon to attend and cooperate, but Nixon continued to be uncooperative.

3. Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objecting to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985.

What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred

as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

The legal issue before us is whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se. If Strickland applies, rather than Cronic, then correct legal analysis dictates that the trial judge should be affirmed, not reversed, because competent, substantial evidence supports the trial court's legal ruling that Nixon has failed to establish the requisite prejudice.

I first point out that the decision of whether Cronic applies on this record was decided by this Court in 1990, when it entertained Nixon's direct appeal. Had this Court in 1990 concluded that Cronic applied, surely it would have applied it and not wasted these last nine years. The record before this Court now stands the same as the record before it when it first considered Nixon's Cronic claim in 1990. The trial court was correct in concluding that Strickland applied, for why else would the Court have sent the case on to postconviction proceedings? What the majority actually does is grant a rehearing of the 1990 decision by this Court, and that is wrong.

I also point out that the majority's decision is based on an overly expansive interpretation of Cronic. The majority's decision as to the application of Cronic is based on cases which either do not apply or cases whose reasoning have been justifiably criticized. The majority relies on cases from the Ninth and Tenth Circuits. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991), Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). The First Circuit has rightfully rejected the expansive interpretation placed on Cronic in Swanson and Osborn. In Scarpa

v. Dubois, 38 F.3d 1 (1st Cir. 1994), the First Circuit considered a case in which a lawyer argued a defense on behalf of his client which was tantamount to admitting guilt:

> As mentioned above, the district court relied primarily on dictum contained in United States v. Cronic, 466 U.S. at 658-60, 104 S.Ct. at 2046-47, for the proposition that, in the circumstances at bar, it could forgo an inquiry into actual prejudice. The Cronic Court stated that in rare instances prejudice might be presumed "without inquiry into counsel's actual performance at trial." Id. at 662, 104 S.Ct. at 2048 (dictum). But, the approach suggested in this statement is in all events the exception, not the rule - and it can been employed only if the record reveals presumptively prejudicial circumstances such as an outright denial of counsel, a denial of the right to effective cross-examination, or a complete failure to subject the prosecution's case to adversarial testing. See id. at 659, 104 S.Ct. at 2047. The Cronic Court itself warned that, in most cases, a showing of actual prejudice remained a necessary element. See id. The Court stated: "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Id. at 659 n.26, 104 S.Ct. at 2047 n.26.
>
> For the most part, courts have been cautious in invoking the exception limned in the Cronic dictum. Cronic-like principles have been applied, for example, in situations in which defense counsel labored under an actual conflict of interest, see Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), or in

which no attorney appeared despite a defendant's unwaived right to appointed counsel, see United States v. Mateo, 950 F.2d 44, 48-50 (1st Cir. 1991), or in which defendant's lawyer sat in total silence throughout the relevant proceeding, see Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (involving resentencing); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (holding that defense counsel's muteness throughout trial, including his utter silence as the judge directed a verdict against his client, is per se prejudicial), or in which the defense attorney was absent from the courtroom during a critical part of the trial, see Green v. Arn, 809 F.2d 1247, 1259-64 (6th Cir.), cert. granted, vacated and remanded to consider mootness, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987); Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985), or, pre-Cronic, in which counsel snoozed through much of the proceedings, see Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984).

A few courts have extended the exception's boundaries beyond the circumstances surrounding representation and found that a lawyer's particular errors at trial may cause a breakdown in the adversarial system and thus justify invocation of the Cronic dictum. See Swanson, 943 F.2d at 1074 (holding that knowingly and explicitly conceding reasonable doubt in closing argument is per se prejudicial); Osborn, 861 F.2d at 628-29 (finding per se prejudice when defense counsel intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had no evidence to support his claims). We believe that these cases misperceive

the rationale underlying the Cronic expression. In our view, the Court's language in Cronic was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance - for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter - that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. See Cronic, 466 U.S. at 658-59, 104 S.Ct. at 2046-47. But attorney errors particular to the facts of an individual case are qualitatively different. Virtually by definition, such errors "cannot be classified according to likelihood or causing prejudice" or "defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Consequently, the Court has declined to accord presumptively prejudicial status to them. See id.

We are not alone in our attempt to harmonize Cronic with Strickland by drawing an easily visible line separating those few cases in which prejudice may be presumed from the mine-run (in which actual prejudice must be shown). When confronted by particular errors on the part of defense counsel, best evaluated in the context of the defendant's trial, other federal courts have refused to march under the Cronic banner, and, instead, notwithstanding the seriousness of the errors, have performed both parts of the requisite Strickland analysis. Thus, in McInerney v. Puckett, 919 F.2d 350 (5th Cir. 1990), the defendant claimed that his lawyer's lack of

preparedness and failure to raise an insanity defense justified the invocation of the Cronic dictum. See id at 352-53. In requiring a showing of prejudice, the Fifth Circuit noted that "bad lawyering, regardless of how bad, does not support the [per se] presumption; more is required." Id. at 353; see also United States v. Thompson, 27 F.3d 671, 676 (D.C. Cir. 1994) (finding no prejudice per se in defense counsel's failure to inform defendant before guilty plea that, as a career offender, he faced possible life imprisonment); United States v. Baldwin, 987 F.2d 1432, 1437-38 (9th Cir.) (finding no prejudice per se where attorney conceded his client's guilt at pretrial conference and neglected to request jury instruction on overt act requirement for conspiracy charge), cert. denied, 508 U.S. 967, 113 S.Ct. 2948, 124 L.Ed.2d 696 (1933); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990) (requiring showing of prejudice where defense counsel advised the accused to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-45 (2nd Cir.) (applying full Strickland standard in spite of defendant's claim that counsel's errors were so pervasive as to amount to "no counsel at all"), cert. denied, 498 U.S. 990, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990); Green v. Lynaugh, 868 F.2d 176, 177-78 (5th Cir.) (applying full Strickland analysis to attorney's decision to conduct "almost no investigation"), cert. denied, 493 U.S. 831, 110 S.Ct. 102, 107 L.Ed.2d 66 (1989); Henderson v. Thieret, 859 F.2d 493, 499 (7th Cir. 1988) (applying second prong of Strickland to attorney's lack of preparation in connection with sentencing), cert. denied, 490 U.S. 1009, 109 S.Ct. 1648, 104 L.Ed.2d 163 (1989); Gardner v.

Ponte, 817 F.2d 183, 186-87 (1st Cir.) (refusing to extend Cronic to attorney's failure to object to jury instructions), cert. denied, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 134 (1987); State v. Savage, 120 N.J. 594, 577 A.2d 455, 466 (1990) (finding no prejudice per se in a capital case where counsel only met once with defendant). Similarly, in reviewing claims of ineffective assistance of counsel at the appellate level, courts have declined to apply Cronic to attorney errors that do not amount to the constructive absence of counsel. See, e.g., Hollenback v. United States, 987 F.2d 1272, 1276 & n.1 (7th Cir. 1993) (finding no per se prejudice in appellate counsel's citation to wrong provision of money-laundering statute); United States v. Birtle, 792 F.2d 846, 847-48 (9th Cir. 1986) (finding no per se prejudice when defendant's appellate counsel failed to appear at oral argument or file a reply brief).

> There authorities suggest that attorney error, even when egregious, will almost always require analysis under Strickland's prejudice prong. We agree. Thus, we decline to adopt the expanded version of Cronic embraced by the district court. Our reasons are manifold, but four of them are paramount.

38 F.3d at 11-14 (footnotes omitted) (emphasis added).

The Fifth Circuit has also been critical of the Ninth Circuit with regard to that court's interpretation of Cronic. In Childress v. Johnson, 103 F.2d 1221 (5th Cir. 1997), the court held:

> While gleaning insight from Swanson's statement of Sixth Amendment principles, we do not necessarily endorse its finding of a

> constructive denial of counsel. Defense counsel in Swanson failed to call witnesses and conceded in his closing argument that the evidence of his client's guilt was overwhelming. These appear to be trial errors amenable to Strickland analysis. See Scarpa v. Dubois, 38 F.2d 1, 12 (1st Cir. 1994) (criticizing Swanson), cert. denied, ___ U.S. ___, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995).

103 F.3d 1229 n.12 (emphasis added). In Vines v. United States, 28 F.3d 1123 (11th Cir. 1994), the Eleventh Circuit stated:

> "Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984).

Id. at 1128 n.8.

No fair reading of the instant record can lead to the conclusion that Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase. This was appropriately stated by Judge Hall in 1985, and this Court is wrong to ignore it in 1999.

I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 14 (slip opinion): "[W]e

conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a Boykin[9] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

Finally, I believe this case again exemplifies why this Court must have a much better and more pro-active case management procedure in capital cases. If, as the majority now holds, the record had to contain "specific testimony," there is no justifiable explanation as to why it has taken a decade to determine whether that testimony exists or to require a new trial. Since I have been on this Court, I have repeatedly advocated that this

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[9] Boykin v. Alabama, 395 U.S. 238 (1969).

Court actively case-manage these cases following the direct appeal. This case plainly demonstrates the past-due need for this Court to implement procedures for quarterly case management conferences in the trial courts with status reports reviewed each quarter by this Court and direction through the Chief Justice to the Chief Judge or each circuit in respect to cases in which appropriate progress in the adjudication of postconviction issues is not being made.

Joe Elton NIXON, Appellant.

v.

STATE of Florida, Appellee

No. 67583.

Supreme Court of Florida.

Nov. 29, 1990.

Rehearing Denied Jan. 24, 1991.

Defendant was convicted in the Circuit Court, Leon County, J. Lewis Hall, J., of first-degree murder and sentenced to death. On appeal, the Supreme Court, Ehrlich, J., held that: (1) trial was properly allowed to proceed in capital murder defendant's absence; (2) photographs of victim were admissible; and (3) defendant was not entitled to instruction informing jury of maximum sentences for other crimes of which he had been convicted as mitigating factor.

Affirmed.

T. Whitney Strickland, Jr. of Oven, Gwynn & Strickland, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Patricia A. Conners, Gary L. Printy and Richard B. Martell, Asst. Attys. Gen., Tallahassee, for appellee.

EHRLICH, Justice.

Joe Elton Nixon appeals his conviction of first-degree murder and sentence of death for the 1984 murder of a Tallahassee

woman. He also appeals his convictions of kidnapping, robbery, and arson and the trial court's departure from the recommended guideline sentence for those convictions. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences.

On Monday, August 13, 1984, the charred body of Jeanne Bickner was found tied to a tree in a wooded area in Leon County. The next morning Ms. Bickner's car, the interior and trunk of which had been gutted by fire, was found in a Tallahassee drainage ditch. The same day, after receiving information from Joe Elton Nixon's girlfriend, Wanda Robinson, and brother, John Nixon, that he had admitted the killing, had been driving the victim's car prior to burning it, and had pawned two of her rings, Tallahassee police arrested Nixon. Nixon was charged with first-degree murder, kidnapping, robbery, and arson.

At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop

receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.

After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G. According to the medical examiner, Ms. Bickner was alive at the time she was set on fire and the fire was the cause of death. The jury convicted Nixon of the offenses charged. In accordance with the jury's recommendation, finding five aggravating factors[1] and no mitigating factors, the trial court imposed the death penalty.

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[1] The trial court found the following aggravating factors:

1) the defendant was previously convicted of another violent felony;
2) the murder was committed while the defendant was engaged in the commission of a kidnapping;
3) the murder was committed for pecuniary gain;
4) the murder was especially heinous, atrocious, or cruel; and
5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Nixon raises seven claims in connection with the guilt phase of the trial and eight claims in connection with the penalty phase. Of the fifteen claims raised only nine merit discussion.[2]

GUILT PHASE

Nixon's first claim is that he was denied effective assistance of counsel when his trial counsel, without record approval of Nixon, conceded Nixon's guilt and sought leniency. This claim is based on the following comments by counsel made during opening statement and closing argument. In opening statement, defense counsel stated:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise,

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[2] The following claims do not merit discussion: 1) that section 921.141, Florida Statutes (1983), is unconstitutional;2) that the trial court erred by refusing to omit the words "a possible doubt" from the standard jury instruction on reasonable doubt; 3) that the penalty - and guilt-phase instructions impermissibly diminished the jury's sense of responsibility for its sentencing recommendation, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); 4) that the trial court erred in failing to permit Nixon to make a statement at the sentencing proceeding; 5) that it was error for kidnapping and robbery to be considered in determining guilt and also used as an aggravating factor; and 6) that the trial court erred in barring prospective members of the jury from service without adequate inquiry under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

> that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

During closing argument defense counsel made the following comments:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Nixon takes the position that counsel's statements were the functional equivalent of a guilty plea, requiring a record

inquiry as to whether he knowingly and voluntarily consented to this strategy. Nixon argues that this concession of guilt resulted in a 'complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel' and therefore constitutes ineffective assistance per se under the United States Supreme court's decision in United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). See e.g., Wiley v. Sowders, 647 F.2d 642 (6th Cir.) (petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981); People v. Hattery, 109 Ill.2d 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985) (defense counsel is per se ineffective where counsel concedes defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), cert. denied, 478 U.S. 1013, 106 S.Ct. 3314, 92 L.Ed.2d 727 (1986); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), cert. denied, 476 U.S. 1123, 106 S.Ct. 1992, 90 L.Ed.2d 672 (1986).

Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 27, 1987. After a second order of this Court, dated October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of

February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete.[3] Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

As his second claim, Nixon contends that the prosecutor made an impermissible "Golden Rule" argument when he told the jury 'we have an obligation to make you feel just a little bit

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[3] The trial court found the following pursuant to our order of February 1, 1989:

1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.

2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

3. Nixon made no objection and did not protest the strategy and tactic employed at trial.

Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

. . . of what Jeanne Bicker [sic] felt.' In closing argument during the guilt phase of the trial, the prosecutor stated:

> I noticed sometimes people wonder about and I guess have different ideas on what makes a prosecutor tick. You probably wonder: Well, do Mr. Guarisco and I enjoy the fact that we're presenting this horrid thing to you. I assure you we don't.
>
> Yet, at the same time, we have an obligation to make you feel just a little bit, just a little bit, of what Jeanne Bicker [sic] felt because, otherwise, sometimes I think it's easy to forget that. And the emotions involved in this case - and they are there. There are emotions going both ways in this case.
>
> Hopefully, those emotions on the one hand where you are talking about imposing, well, the most serious penalties we have against a person which is an emotional thing are counterbalanced by the emotions of the terrible thing that's happened in this case. And then as a group of 12 people you can set this aside, set that aside and you make an objective decision. You follow the law that the Judge gives you because that's what we need you to do.

At the close of the state's argument, defense counsel moved for a mistrial, noting 'at this time to instruct the jury to disregard it would be to no avail.' After having the comment read back to the court reporter, the trial court denied the motion stating, 'I don't think that's a Golden Rule argument. I think

it's close, but I don't think that's a pure Golden Rule argument.'

Initially, we note that defense counsel failed to make a contemporaneous objection to the above remarks which were made at the commencement of the state's argument. Ordinarily, to preserve a claim based on improper comment, counsel has the obligation to object and request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver. Clark v. State, 363 So.2d 331, 335 (Fla. 1978), abrogated on other grounds, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In connection with closing argument, a motion for mistrial need not be made in the next breath following the objection to the offensive remark. This rule avoids interruption in the continuity of the argument and affords defendants an opportunity to evaluate the prejudicial nature of the objectionable remarks in the context of the total argument. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980).

Nixon argues that under Cumbie, his motion for mistrial at the close of argument, absent a contemporaneous objection, was sufficient to preserve this issue for appeal. We do not construe Cumbie to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument

would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in Cumbie. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.

Nixon's third claim is that his absence during critical proceedings at various times throughout the trial requires reversal of his conviction and sentence. On July 8 and 9, 1985, Nixon refused to be present during a hearing on various pretrial motions. In both instances counsel waived Nixon's presence for the limited purpose of hearing the motions. Although Nixon was present at the commencement of jury selection on July 15, 1985, as voir dire continued on the morning of July 16, 1985, Nixon refused to enter the courtroom. Defense counsel explained to the judge that Nixon had disrobed to his underwear, and was demanding a black judge and a black attorney, and did not wish to return to the courtroom. After a recess, Nixon still refused to attend the trial. The trial judge then inquired of the bailiff as to why Nixon had not returned. The judge was informed that Nixon had told another officer that he was not going to court 'for them to railroad me.' Defense counsel informed the judge that Florida Rule of Criminal Procedure 3.180(b) allowed a defendant to voluntarily absent himself from the courtroom if the court chose to try Nixon in absentia. The trial court conducted a hearing in the holding cell to determine if it would be in Nixon's best interest to allow him to absent himself from the proceedings. During the hearing, Nixon was clad only in his underwear. He reiterated to the judge that he did not wish to return to the courtroom, that he wanted another attorney and wanted to return to the jail-house. Nixon threatened that if forced to return to the courtroom, 'I still [sic] run my mouth and speak when I get ready unless you

tape it up.' Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him. After questioning the officer who had transported Nixon from the jail to the holding cell concerning the events leading up to appellant's removal of his clothes and desire to return to the jail-house, the trial court indicated that if Nixon did not return to the courtroom that afternoon, the court would consider his decision 'to be a knowledgeable, voluntary and intelligent waiver of his right to be present during the course of the trial.' When Nixon refused to return to the courtroom that afternoon, the court found that Nixon had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him.

> I have considered options including but not limited to, I think, the most severe step which is to compel the attendance of the Defendant by physically forcing his attendance in the courtroom, if necessary to manacle, bind and gag and the like.
>
> It's my view that Mr. Nixon does not want to come to the courtroom. And to bring him into the courtroom under those circumstances would be manifestly prejudicial to this case. Therefore, I'm going to accede to his desire not to participate.
>
> It's my view that we have done about as much as can possibly be expected to seek to accommodate attendance for him. To induce him to attend. We've even recessed Court for a period of time so that he might reflect upon that decision. That has been to no avail.

During voir dire, defense counsel asked prospective jurors if Nixon's absence would affect their impartiality and all replied that it would not. Thereafter, Nixon refused to attend most of his trial.

In Peede v. State, 474 So.2d 808, 814 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986), we held that 'a defendant can waive his right to be present at stages of his capital trial if he personally chooses to voluntarily absent himself.' It is clear from the record that Nixon did not wish to attend the proceedings, threatening to disrupt them if so forced. A defendant will not be forced to attend his capital trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury. As in Peede, the trial judge in this case took every precaution to ensure that Nixon's absence was voluntary. A hearing was held in Nixon's holding cell. A recess was initially taken to allow Nixon time to reflect on his decision. Counsel was allowed to question the prospective jurors to ensure Nixon's absence would not prejudice him. At various intervals throughout the proceedings the trial judge questioned a custodial officer to ascertain whether Nixon had evidenced a change of mind, which he had not. Under these circumstances, it was not error to proceed with the trial in Nixon's absence.

During the guilt phase of the trial seven photographs of the victim were entered into evidence over defense counsel's objection. Nixon contends that the admission of an 'unnecessarily large number of inflammatory photographs' of the victim in a charred state resulted in a fundamentally unfair proceeding. He maintains that 'there was no justifiable relevancy for the admissibility of the photographs since the cause of death and nature of death had been clearly established and there was no circumstance which necessitated the introduction of photographs of the victim.' The test of

admissibility of photographs such as these is relevancy rather than necessity. Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986). Four of the photographs, exhibits 10G, 10H, 10K, and 10J, showing various positions of the victim's charred body tied to a tree at the crime scene were introduced by the state during the testimony of Deputy Gunter. The photographs were introduced to aid the detective in explaining the condition of the crime scene when the police arrived. See id. (allegedly gruesome photographs of victim relevant to show condition of the body when first discovered by the police and to show considerable pain inflected on victim). The other three photographs, exhibits 12, 13A, and 13B, which were taken at the coroner's office and which show the victim's head and upper body were introduced during the pathologist's testimony. These photographs assisted the pathologist in explaining the nature of the victim's injuries and the cause of her death. See Bush v. State, 461 So.2d 936, 939 (Fla. 1984) (photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986).

We do not agree that the seven photographs admitted, none of which were cumulative, constituted an unnecessarily large number of inflammatory photographs. Cf. Young v. State, 234 So.2d 341 (1970) (error to admit forty-five gruesome photographs of the victim), receded from on other grounds, State v. Retherford, 270 So.2d 363 (Fla. 1972). Nixon is correct that the challenged photographs are extremely gruesome; they accurately depict the fact, as noted in the trial court's sentencing order, that 'Jeanne Bickner was the victim of a vicious, barbaric and savage murder.' However, because the photographs are not so shocking in nature as to outweigh

their relevancy, the trial court did not abuse its discretion in admitting them. Bush, 461 So.2d at 940.

We also find no merit to Nixon's next claim that the trial court erred in failing to establish the competency of a juror who was excused from service during the penalty phase of the trial due to emotional problems. The jury returned its verdict of guilty on Monday, July 22, 1985. On Wednesday, July 24, during the penalty phase of the trial, the trial judge was informed by the bailiff that he was concerned about Juror number 12, who was exhibiting 'strange' behavior. With counsels' concurrence the trial judge decided that Juror number 12 should be monitored. At this point, defense counsel expressed concern that if Juror number 12, who was black, was removed from the jury it might upset the 'representative mix' which had been achieved. Defense counsel also expressed concern that if the juror's problem was not a new one, it could have affected the jury's guilt determination. The next day, the bailiff informed the court that it had been difficult to get Juror number 12 ready to come to court because she locked herself in the bathroom. The bailiff also informed the court that he had learned that 'a few years ago' Juror number 12 had a nervous breakdown and that she was 'in the process of taking Lithium.' According to the bailiff, the bizarre behavior was first manifested on Tuesday afternoon, July 23, the day after the conclusion of the guilt phase of the trial. The trial court determined that Juror number 12 should be replaced by an alternate. The court concluded that 'the condition of Juror No. 12 did not manifest itself until the conclusion of the guilty/not guilty phase. I see no reason to disturb that facet of the case.

We agree with the state that the issue was not properly preserved for review. Although defense counsel evidenced concern that Juror number 12's problems may have affected the guilt phase of the trial, counsel never sought further judicial

inquiry. Counsel did not object to the trial court's conclusion that Juror number 12's condition did not manifest itself until after the guilt phase of the trial was completed nor did he move for a mistrial. In fact, defense counsel acknowledged that 'the onset of [Juror number 12's] symptoms was apparently post-guilt phase' and that 'there is no clear indication' that Juror number 12 had mental problems that could have affected the jury's guilt-phase deliberations. Counsel also declined to voir dire Juror number 12 before the matter was concluded. Further, even if the issue had been preserved, there was insufficient evidence that Juror number 12 likely suffered from incompetence during the guilt phase to warrant further inquiry. See United States v. Mauldin, 714 F.2d 854 (8th Cir. 1983) (absent substantial if not wholly conclusive evidence of incompetency, such as proof of an adjudication of insanity or mental incompetence made shortly before or after the trial, courts will not set aside a verdict or make further inquiry into a juror's competency during trial); United States v. Dioguardi, 492 F.2d 70 (2d Cir.) (same), cert. denied, 419 U.S. 873, 95 S.Ct. 134, 42 L.Ed.2d 112 (1974).

PENALTY PHASE

Nixon's first claim in connection with the penalty phase of the trial concerns a statement made by Nixon after his arrest to Detective Livings concerning the removal of Ms. Bickner's underwear. During the penalty phase of the trial, Detective Livings testified that between 8:00 and 9:20 p.m. on the day of Nixon's arrest he asked Nixon about the victim's underwear. According to the detective, Nixon told him he had removed them because he wanted to scare her. Nixon maintains that the

statement was inadmissible because it was given without full benefit of Miranda[4] warnings. We cannot agree.

There is no requirement that an accused by continually reminded of his rights once he has intelligently waived them. Bush v. State, 461 So.2d at 939. Nixon had been given full Miranda warnings on at least four separate occasions prior to his taped confession, twice at the time of his arrest, once in route to the police station, and once at 12:20 p.m. prior to giving the taped confession. Each time he stated that he understood his rights and prior to giving the taped confession he executed a written waiver which has not been challenged. Approximately eight hours after giving the taped confession, Detective Livings told Nixon that he had a question to ask him. The detective advised Nixon 'that [Nixon] didn't have to talk with [him]; that [Nixon] did not have to give [him] any information; that [Nixon] still had the right to remain silent.' After being reminded of his rights, Nixon indicated his willingness to speak with Detective Livings by stating 'I got no problems talking with you.' Although the detective did not give Nixon a full Miranda warning, the trial court correctly ruled that Nixon understood his rights and knowingly and intelligently waived them prior to the challenged statement and that his statement that he had no problem discussing the case was a valid waiver.

We also reject Nixon's claim the trial court erred in failing to instruct the jury on mitigating factors under sections 921.141(6)(b) (defendant was under the influence of extreme mental or emotional disturbance), 921.141(6)(f) (capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was

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[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

substantially impaired), and 921.141(6)(g) (age of defendant at the time of the crime), Florida Statutes (1985). Nixon argues that although defense counsel requested that no instructions be given on statutory mitigating factors, the trial court had a duty to so instruct because there was evidence of each of these factors. Defense counsel specifically requested that only the following instruction be given:

> The mitigating circumstances which you may consider are unlimited, and you may consider any evidence presented at trial and during the sentencing proceedings in mitigation of the defendant's sentence.

Since defense counsel requested that the instructions to which Nixon claims he was entitled not be given, he cannot now take the position that it was error to fail to give them. Further, while it may have been preferable to have instrueted on the statutory mitigating factors urged, the catchall instruction given served as an adequate vehicle to allow the jury to consider all the mitigating evidence presented.

In connection with the above claim, Nixon also maintains that the trial court impermissibly refused to consider the mitigating evidence presented. While the trial court found that there was no evidence to support these mitigating factors, it is clear from the record that the court considered and rejected all the evidence presented.

Nixon next claims that the trial court erred in refusing to give a requested instruction informing the jury of the maximum sentences for kidnapping, robbery, and arson. During the penalty phase of the trial, defense counsel requested such an instruction, stating that he wanted 'to be able to argue those potential punishments to the jury as part of the theory of

defense.' The trial court denied the request, noting that the jury obviously knew that it had convicted Nixon of the three other felonies. The court expressly noted that defense counsel was entitled to argue in mitigation that Nixon stood convicted of the other serious felonies. Defense counsel reiterated his objection to the court's refusal to give the requested instruction.

Nixon maintains that the fact that he was convicted of three other offenses which carried lengthy maximum penalties was a circumstance on which the jury should have been instructed under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Florida Rule of Criminal Procedure 3.390(a) provides that '[e]xcept in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.' This rule has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties. Coleman v. State, 484 So.2d 624, 628 (Fla. 1st DCA 1986).

As we recently noted in King v. Dugger, 555 So.2d 355, 359 (Fla. 1990), 'Lockett requires that a sentencer 'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'' The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime. Therefore, the trial court did not err in refusing to give the instruction. Even if it had been appropriate for the jury to be instructed on the maximum penalties for the other crimes, the requested instruction merely set forth the maximum sentences for each of the noncapital

offenses. The instruction did not inform the jury that it could consider the maximum sentences for the noncapital offenses as a mitigating factor. The jury was aware of the noncapital offenses for which Nixon was convicted, counsel urged those convictions as mitigation, and the jury was instructed that the factors which it would consider in mitigation were unlimited.

GUIDELINES DEPARTURE

In connection with the kidnapping, robbery, and arson convictions, the trial court departed from the recommended guideline range of twelve-to-seventeen years, sentencing Nixon to consecutive terms of life imprisonment for kidnapping, fifteen years for robbery, and fifteen years for arson. The court based departure on the following: 1) the '[e]motional trauma suffered by the victim and her fear and emotional distress;' 2) Nixon's 'escalating pattern of criminal conduct culminating in the instant offense;' 3) Nixon's status as an habitual offender; and 4) '[a]ny other reasons articulated by this Court at the sentencing hearing.'

We agree that reasons 3 and 4 are not clear and convincing reasons for departure. Winters v. State, 522 So.2d 816 (Fla. 1988); Whitehead v. State, 498 So.2d 863 (Fla. 1986); State v. Jackson, 478 So.2d 1054 (Fla. 1985), abrogated on other grounds, Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987). However, we have held reasons 1 (emotional trauma) and 2 (escalating criminal conduct) to be clear and convincing under appropriate circumstances. In Tillman v. State, 525 So.2d 862, 864 (Fla. 1988), we explained that

> emotional trauma of the victim, may serve as a clear and convincing reason for departure where

> there is evidenced 'a discernible physical manifestation resulting from the psychological trauma,' State v. Rousseau, 509 So.2d 281, 284-85 (Fla. 1987), or where there is evidence that the trauma is the result of 'extraordinary circumstances which are clearly not inherent in the offense charged.' Casteel v. State, 498 So.2d 1249, 1253 (Fla. 1986).

While there was no evidence of a physical manifestation of psychological trauma because the victim in this case died at the scene, there is credible evidence that after being abducted, Ms. Bickner was tied to a tree and terrorized before being burnt alive. These are extraordinary circumstances causing emotional trauma which are clearly not inherent in the crimes of kidnapping or robbery. Cf. Ochoa v. State, 509 1115 (Fla. 1987) (emotional trauma not clear and convincing reason for departure where there were no 'extraordinary circumstances' clearly not inherent in the crime of kidnapping causing the trauma).

Reason 2 (escalating pattern of criminal conduct) is a valid reason for departure, Keys v. State, 500 So.2d 134 (Fla. 1986), which is supported in this case by evidence of Nixon's prior criminal history. As a juvenile, Nixon was adjudicated delinquent six times in connection with various charges of shoplifting, petit larceny, grand larceny, possession or sale of stolen property, first-degree arson, possession of burglary tools, and burglary. As an adult, Nixon was convicted of armed robbery in 1980, burglary of a structure in 1981, attempted burglary of a dwelling in 1984 and the offenses for which he now stands convicted: arson, robbery, kidnapping, and murder.

While reason 4 (any other reasons articulated at sentencing) is not a clear and convincing reason for departure under our decision in Jackson, 478 So.2d at 1055-56, there did not appear to have been other reasons articulated at the sentencing hearing upon which the departure could have been based. Because we find beyond a reasonable doubt that the trial court would have departed in the absence of the invalid reasons, we need not remand for resentencing. Albritton v. State, 476 So.2d 158 (Fla. 1985).[5]

Accordingly, Nixon's convictions and sentences are affirmed.

SHAW, C.J., and OVERTON,

McDONALD, BARKETT, GRIMES and KOGAN, JJ., concur.

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[5] While our decision is not based on this factor, we note that Nixon's conviction of first-degree murder, a capital felony which cannot be scored as an additional offense at conviction, could have served as a valid reason for departure. Torres-Arboledo v. State, 524 So.2d 403, 414 (Fla.), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988); Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987).